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In the  
**Supreme Court of the United States**  
**OCTOBER TERM, 1955**

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**NATIONAL LABOR RELATIONS BOARD,**

*Petitioner,*

*v.*

**THE BABCOCK & WILCOX COMPANY,**

*Respondent.*

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*On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit*

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**BRIEF FOR RESPONDENT IN OPPOSITION**

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O. B. FISHER,  
Liberty National Bank  
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Paris, Texas,

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**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fifth Circuit is "Appendix A" of the petition and is reported at 22 F. 2d 316. The findings of fact, conclusions of law, and order of The National Labor Relations Board are reported at 109 N. L. R. B. 485 and appear in the record heretofore filed by Petitioner. (R. 50-82)<sup>1</sup>. The order of the Board is attached hereto as "Appendix A."

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1. "R" refers to the transcript of record; BA to the Appendix to the Board's brief in the Court of Appeals and RA to the Appendix to respondent's brief in the Court of Appeals.

## JURISDICTION

Jurisdictional requisites are stated in the petition. However, Respondent now suggests that the question presented by the petition is not the question determined in this case by the Board and United States Court of Appeals for the Fifth Circuit.

## QUESTIONS PRESENTED

1. Whether an employer violates Section 8(a) (1) of the National Labor Relations Act by non-discriminatory prohibiting non-employee union organizers from distributing union literature on its plant parking lot and alongside its private walkways and driveways under an existing non-discriminatory rule against distribution of literature on its premises.

2. Whether The National Labor Relations Board can in the broad language of Sections 7 and 8(a) (1) of the National Labor Relations Act restrain an employer from engaging in any conduct like or related to the one isolated act found to constitute an unfair labor practice.

## STATEMENT

The statement of Petitioner at pages 3, 4, and 5 of the petition is adopted by Respondent as an incomplete statement of the facts. Additionally, the facts are:

(1) There are several state highway signs along the highway as it passes Respondent's premises including "No Parking" signs, one "Speed Limit 60 miles per hour," one

"Curve 30 miles per hour," one "R. R. Crossing" and one "Curve 40 MPH." (R. 68.)

(2) About sixty per cent of the employees at Respondent's plant have telephones, of which about ninety per cent are on the Paris telephone exchange. (R. 68.)

(3) The estimated sixty per cent of Respondent's employees who do not live in Paris live an average of ten to twelve miles from the plant. When coming into Respondent's driveway, most employees come from the direction of Paris and when leaving head in the direction of Paris, North from the plant. From Respondent's drive going North, it is about three-quarters of a mile to the first cross road and on the South, the first cross road is about 2 or 3 miles. (R. 68.)

(4) On three occasions the Union has distributed union literature to Respondent's employees at the point where the driveway meets the right-of-way. On June 15, at the change of shifts in the afternoon, union representatives distributed about 300 pieces of literature as some 325 employees were driving in and out of the driveway. On June 30, they distributed at least 195 pieces as 250 employees were driving out. On July 13, they passed out over 225 pieces as 250 employees were leaving work. (R. 69.)

(5) Other union contacts with employees. In addition to distributing literature to some of the employees, as shown above, during the period of concern the Union has had other contacts with some of the employees. It has com-



municated with over 100 employees of Respondent on three different occasions by sending literature to them through the mails. Union representatives have communicated with many of Respondent's employees by talking with them on the streets of Paris, by driving to their homes and talking with them there, and by talking with them over the telephone. All of these contacts have been for the purpose of soliciting the adherence and membership of the employees in the Union. (R. 71-72.)

(6) The order of the Board is as shown by Appendix B and also appears in Appendix A of the petition, page 16. The Board's order required that Respondent cease and desist from prohibiting the distribution of union literature by union representatives on its premises, subject only to the imposition by Respondent of reasonable and non-discriminatory regulations in the interest of plant efficiency and discipline, but not so as to deny access to union representatives for the purpose of effecting such distribution; and from engaging in any like or related acts or conduct which interferes with, restrains or coerces its employees in the exercise of their right to self organization \* \* \*. (R. 53-54.)

The United States Court of Appeals for the Fifth Circuit denied enforcement of the Board's order for the reasons stated in the opinion and did not deal with the secondary proposition that the order was too broad, page 17 of the petition.

## ARGUMENT

It is not intended by Respondent to take the position that a determination by this Honorable Court of questions related to that presented by the petition would not be of importance and of great value to the public generally but it is felt that such question is narrow, and so limited in its comprehension that consideration by this Court at this time is neither required nor justified. The position is that consideration of the mere question presented would place an undue burden on the Court. Admittedly, the determination would be interesting. The question which involves only distribution of union literature during the "employees' free time" is new to this case. The order of the Board does not mention "employees' free time." It deals with distribution of Union literature on Respondent's premises by Union representatives, not employees, subject to reasonable and non-discriminatory regulations imposed by Respondent in the interest of plant efficiency and discipline, but not as to deny access to Union representatives for the purpose of effecting such distribution. Such question was not determined by the Court of Appeals, which dealt with the order made by the Board and only such order.

Counsel for Respondent is not aware of the existence of any conflict in decisions on the question presented by the petition for writ of certiorari and is not aware of any decision of this Supreme Court or of any decision of any United States Court of Appeals squarely and irreconcilably in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in this case. The primary



question in this case is plainly stated in the Court of Appeals' opinion by Chief Judge Hutcheson in these words:

"This question is whether, on a record devoid of proof that any employees were disciplined or in any manner discriminatorily dealt with by the respondent, or were or desired to be members of the union, or were in any way connected with or interested in the distribution by the union representatives of its literature, the board had authority to require the respondent to institute in favor of non-employee union organizers, complete strangers to it and to its employees, a discriminatory non-enforcement of its non-distribution rule, which the proof showed and examiner and board found had always and uniformly been enforced in a completely non-discriminatory way."

The thought is entertained that the National Relations Board should not for its assistance in the administration of the National Labor Relations Act petition the Supreme Court to grant writ of certiorari for determination of a question not first directly and expressly determined by a United States Court of Appeals. The Board should follow the Court decisions, applying the decisions respectively to sets of facts like and similar to the facts involved in each decision until such time as an irreconcilable conflict exists. Then, if ever the conflict in decisions occurs, not a new and different question, but the identical question passed upon by different courts should be presented to this Court.

It is not believed a conflict in decisions of this character exists at this time.

## THERE IS NO REAL CONFLICT OF DECISIONS

There is no real conflict between the decisions of the Court of Appeals for the Fifth Circuit in this case and any decision of this Honorable Supreme Court or any United States Court of Appeals. Some of the decisions cited by petitioner are in strict accord with the decision of the Court of Appeals for the Fifth Circuit denying enforcement of the Board's order in this case and neither of the decisions is squarely and directly in conflict with the Court of Appeals' decision herein on the questions of law and the facts involved.

In each of the Fourth Circuit cases of *National Labor Relations Board v. Caldicell Furniture Company*, 199 F. 2d 267, certiorari denied 345 U. S. 907, and *National Labor Relations Board v. Carolina Mills, Inc.*, 190 F. 2d 675, 676, cited as being in conflict with the decision in this case, neither of the brief per curiam opinions states whether or not the persons prohibited from making the distribution of literature were employees. It is apparent that the question of the individuals involved not being employees was not raised and the court did not pass upon such question in either case.

The only other decision cited by Petitioner as being in conflict with the opinion of the Court of Appeals in this case is that of the Sixth Circuit Court of Appeals in *National Labor Relations Board v. Ranco, Inc.* F. 2d enforcing order of Board reported in 109 N. L. R. B. 998.

Respondent is informed that motion for rehearing has been denied in that case, mandate issued and then recalled by order of the Court pending the filing of a petition for writ of certiorari in this Supreme Court. However, the *Ranco* case is distinguishable from this case on its facts. While the decision of the Circuit Court of Appeals does not give the facts in detail, the decision of the National Labor Relations Board reveals that the employer therein did not have a rule prohibiting all distribution of union literature upon its premises. *Raíco, Inc.* permitted distribution of union literature by its employees which resulted in there being one group of employees distributing pro-union literature and another group of employees distributing anti-union literature upon the employer's premises. The employer engaged in assisting the group distributing the anti-union literature by defraying the cost of printing such literature. In the face of these facts, the employees being obviously interested in the union organizational effort and distribution of union literature, the employer refused to permit non-employee union organizers to distribute union literature on its premises. Contrarily in this case now before the Court, as stated in the opinion of the Circuit Court of Appeals, the record is devoid of any proof that any of the Babcock & Wilcox Company employees were or desired to be members of the union or were in any way connected with or interested in the distribution by the union representatives of its literature. Further, the record is conclusive that no literature, pro-union, anti-union or otherwise, was permitted by Respondent to be distributed on its premises.

Petitioner does not directly contend but suggests by inference that the decision of the Court of Appeals for the Fifth Circuit in this case is in conflict with the decision of this Honorable Court in the case of *National Labor Relations Board v. LeTourneau Company*, 324 U. S. 793. The Court of Appeals in opinion by Chief Judge Hutcheson discusses and recognizes the *LeTourneau* decision. Mr. Justice Reed, who for the Court wrote the decision in the *LeTourneau* case, in his dissenting opinion in the case of *National Labor Relations Board v. Stowe*, 336 U. S. 226, said:

"It is only when there is a violation through an interference with or a restraining or coercion of employees' rights under Section 7 that an unfair labor practice finding may be predicated on the employer's acts. The employer is not required to aid employees to organize. The law forbids only interference.

\* \* \* \* \*

"It has never been held that where the employees do not live on the premises of their employer a union organizer has to be admitted to those premises."

The dissenting opinion by Mr. Justice Reed was written after the decision in the *LeTourneau* case and certainly we should understand that he used the language quoted with a full and correct knowledge of the meaning and effect of the *LeTourneau* decision and how it was intended by the Supreme Court to be interpreted and applied.

Respondent respectfully submits that the decision of the Court of Appeals for the Fifth Circuit is not in conflict

with the decision of the Supreme Court in the *LeTourneau* case but is in accord therewith.

## II.

### THE DECISION IS CORRECT

The decision of the Court of Appeals for the Fifth Circuit is clearly correct. Two other Courts of Appeals have recently passed upon the question involved in this decision, the Court of Appeals for the Tenth Circuit in the case of *National Labor Relations Board v. Seamprufe, Inc.*,

*F. 2d* (Decided May 4, 1955) and the Court of Appeals for the Ninth Circuit in the case of *National Labor Relations Board v. Monsanto Chemical Company*, *F. 2d* (Decided July 27, 1955). These Courts came to the same conclusion as the Court of Appeals for the Fifth Circuit in this case and denied enforcement of an order of the National Labor Relations Board requiring an employer to permit outside union organizers to distribute union literature upon the employer's premises, where such employer had a non-discriminatorily adopted and non-discriminatorily enforced rule prohibiting such distribution.

The Fifth Amendment to the Constitution of the United States expressly provides that one shall not be deprived of his property without due process of law. This provision of the Constitution was recognized and adhered to by the Seventh Circuit Court of Appeals in the case of *Marshall Field & Company v. National Labor Relations Board*, 200 *F. 2d* 375. In that case outside union organizers were attempting to gain access to the employer's premises for the



distribution of union literature to the employees. Enforcement of the order of the National Labor Relations Board requiring the employer to permit the union organizers to distribute union literature on the employer's premises was denied. The *Marshall Field & Company* case was decided subsequent to the *Le Tourneau* case (*supra*) and the Court of Appeals for the Seventh Circuit therein distinguished the *Le Tourneau* case, as has the Court of Appeals for the Fifth Circuit in this case, by stating that the *Le Tourneau* case involved union organizers who were employees and that such organizers had been discharged by the employer for violation of a no-distribution rule. It follows that the opinion in the *Marshall Field & Company* case supports the decision of the Court of Appeals for the Fifth Circuit herein, notwithstanding the position of Petitioner to the contrary.

The opinion of the Fifth Circuit Court of Appeals herein is also supported by the decisions in the cases of *National Labor Relations Board v. Mooresville Mills*, 204 F. 2d 87 and *Newport News Childrens' Dress Company, Inc.*, 91 N. L. R. B. 1521. In each of these cases it was held that a no distribution rule does not violate the act where it does not appear that such rule constitutes a serious impediment to self organization. The evidence is clear herein that Respondent's no distribution rule did not and does not constitute a serious impediment to self organization of its employees. It was admitted that the union successfully distributed its literature to Respondent's employees on at least three occasions. (R. 69.) It was also admitted that the



union successfully communicated with a substantial number of Respondent's employees by sending literature to them through the mails, by talking with them on the streets of Paris, by talking with them at their homes and by talking to them by telephone. (R. 71-72.) All of Respondent's employees live within a 30 mile radius of Respondent's plant and most of them live within a 10 mile radius of the plant. There are many avenues of communication between the union representatives and Respondent's employees available at all times to the union and the record clearly shows that the union was successful in communicating with such employees through each channel of communication which it attempted to use. As stated by Mr. Justice Reed in his dissenting opinion in the *Stowe Spinning* case (*supra*),

"This gives ample opportunity for union membership proliferation."

It follows that the Court of Appeals for the Fifth Circuit properly decided the questions presented in this case.

### III.

#### INADEQUACY OF ORDER

The order of the Board, couched in the general language of the National Labor Relations Act, is so broad in its scope, vague and uncertain, that Respondent is not apprised with any degree of certainty as to what act or acts are thereby restrained. The vagueness of the order to cease and desist from prohibiting the distribution of union literature by union representatives subject to the imposition

of reasonable and non-discriminatory regulations by Respondent, in the interest of plant efficiency and discipline, but not as to deny access to the union representatives for the purpose of effecting such distribution, is only surpassed by the vagueness and uncertainty of provision (b) thereof ordering Respondent to cease and desist from engaging in any like or related acts or conduct which interferes with, restrains or coerces its employees in the exercise of their right of self organization. *National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426, and *May Department Stores v. National Labor Relations Board*, 326 U. S. 376, require that any cease and desist order must be exact and specific in what it requires and forbids. This order does not so do.

### CONCLUSION

Respondent respectfully urges that the petition for writ of certiorari be denied for the reasons stated; and prays alternatively, and in the event the writ is granted, that this Honorable Supreme Court summarily affirm the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

O. B. FISHER,  
Liberty National Bank  
Building,  
Paris, Texas,  
*Counsel for Respondent.*

September 1, 1955.

**CERTIFICATE**

The undersigned Counsel for Respondent certifies that five copies of the foregoing brief were deposited in a United States Post Office with air mail postage prepaid to each Hon. Simon E. Sobeloff, Solicitor General, Department of Justice, Washington 25, D. C., and David P. Findling, Esq., Associate General Counsel, National Labor Relations Board, Washington 25, D. C., this September 2nd, 1953.

**APPENDIX A****ORDER**

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Babcock and Wilcox Company, Paris, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Prohibiting the distribution of union literature by union representatives on its parking lot and alongside the walkways from the gatehouse to the parking lot and the drive, provided, however, that the Respondent may impose reasonable and nondiscriminatory regulations in the interest of plant efficiency and discipline, but not as to deny access to union representatives for the purpose of effecting such distribution.

(b) Engaging in any like or related acts or conduct which interferes with, restrains, or coerces its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist United Steelworkers of America, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization

as a condition of employment, as authorized in Section 8 (a) (3) of the act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Rescind immediately its rule prohibiting the distribution of union literature by union representatives on its parking lot at its Paris, Texas, plant, and alongside the walkways from the gatehouse to the parking lot and the drive.

(b) Post at its plant at Paris, Texas, copies of the notice attached hereto as an appendix. 6 Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by the Respondent or its representatives, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material. (R. 53-54.)

(c) Notify the Regional Director for the Sixteenth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

6. In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION